UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOANNE CHAGNON,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 15-493S
	:	
LIFESPAN CORPORATION,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter is before the Court on the motion for summary judgment brought by Defendant Lifespan Corporation ("Lifespan"). ECF No. 24. Lifespan seeks dismissal of claims brought by its former employee, Plaintiff Joanne Chagnon. Plaintiff had been employed by Lifespan's Miriam Hospital ("the Hospital") for twenty-four years, most recently as a unit manager. In July 2015, Plaintiff was terminated by the Hospital because, she alleges, she had engaged in whistleblowing, making two complaints that qualify for protection under the Rhode Island Whistleblowers' Protection Act ("the Act"), R.I. Gen. Laws § 28-50-1, *et seq*. Because I conclude that, as a matter of law, neither of Plaintiff's complaints qualifies as conduct protected by the Act and that, beyond temporal proximity, there is no competent evidence of a causal link between the alleged whistleblowing and the Hospital decision to terminate her, I recommend that Lifespan's motion for summary judgment be granted.

I. BACKGROUND[1]

[1] These facts are drawn from the complaint ("Compl.") (ECF No. 1) and the parties' statements of disputed and undisputed facts, as follows: Plaintiff's Statement of Undisputed Facts ("PSUF") (ECF No. 30); Defendant's Statement of Undisputed Facts ("DSUF") (ECF No. 24-7); Plaintiff's Statement of Disputed Facts ("PSDF") (ECF No. 29); and Defendant's Statement of Disputed Facts ("DSDF") (ECF No. 35). Additional facts are derived from

a. Events Leading to Termination

Plaintiff, a registered nurse, started working at the Hospital in 1991. PSUF ¶ 1. She was promoted four times, finally becoming manager of the Cardiovascular Procedural Care and Endoscopy Unit ("PCU") in July 2012. PSUF ¶ 4. During this span, Plaintiff received positive performance reviews, and was never disciplined. PSUF ¶¶ 5-6. In December 2014, her performance was scored as either "successfully accomplished" or "exceeded objectives." PSUF ¶ 7; ECF No. 28-2 at 75. Her then-supervisor wrote that Plaintiff had "developed some outstanding operational skills," and that her staff was "very engaged in the decision making process affecting patient care, staffing, collaboration, and team work . . . [s]he encourages open dialogue and listens to input from staff, carefully making changes with buy in." PSUF ¶¶ 8-9. In February 2015, additional duties were added to her workload when she was appointed interim manager of the Cardiac Catheterization and EP Laboratory and Nursing in the Cardiac Stress Laboratory ("Cath Lab"). DSUF ¶ 3. In both capacities, as manager of the PCU and as interim manager of the Cath Lab, she was required to supervise nurses, CNAs, secretaries and expediters. DSUF ¶ 2.

Denise Brennan was the Hospital's director of Emergency & Endoscopy Services and Vascular and Interventional Radiology – Nursing, as well as the interim director of Cardiology Services. DSUF ¶¶ 4-5. Beginning in December 2014, Plaintiff became Brennan's direct report. DSUF ¶ 6. Within a few months, Brennan began to receive reports of what she perceived as serious deficiencies in Plaintiff's performance of her duties. See DSUF ¶¶ 7-8.

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the cited evidence, consisting of the two affidavits of Plaintiff's supervisor, Denise Brennan ("Brennan Aff. I" (ECF No. 24-2) and "Brennan Aff. II" (ECF No. 35-1)), and Plaintiff's deposition ("Chagnon Dep.") (ECF Nos. 24-5, 28-2, 35-3).

The first such complaint was brought to Brennan in early March 2015 by the lead nurse for the endoscopy unit. She complained that she was thinking of quitting because Plaintiff was not managing the unit effectively. DSUF ¶¶ 9-15. She claimed that Plaintiff was often absent and, even when she was there, she was not visible on the unit; she seemed disengaged; she had not held a staff meeting in years; and she was providing the lead nurse with no one-on-one supervision. Next, on April 7, 2015, Brennan met with another of Plaintiff's subordinates who corroborated that Plaintiff was not visible in the unit and that she was failing to hold staff meetings or follow up on unit issues. DSUF ¶¶ 16-20. This employee said that Plaintiff seemed overwhelmed and that she delegated much of her work to the department's expediter. Next, the Hospital's Senior Vice President for Medical Affairs complained to Brennan that Plaintiff was a "barrier to change" at meetings. DSUF ¶¶ 22-23. The Hospital's Site Risk Manager complained that Plaintiff failed to return her calls related to patient complaints and risk management. DSUF ¶ 24. On June 30, 2015, three more employees came to Brennan, complaining that Plaintiff was never around, that she was not supportive of the staff and that she was not collaborating on the unit's issues. DSUF ¶¶ 25-28.

As these complaints were brought to her attention, Brennan met with her own supervisor, Chief Nursing Officer Maria Ducharme, to discuss a formal corrective action plan for Plaintiff. DSUF ¶ 30. In the third week of June 2015, Brennan notified Plaintiff that her schedule would change in August, going from four ten-hour shifts to five eight-hour shifts. DSDF ¶ 30; PSUF ¶¶ 30-36. Plaintiff was not happy about this change because of the disruption to her childcare arrangements; she now alleges that this schedule change was an adverse employment action in retaliation for the two whistleblowing complaints. PSUF ¶ 34; Compl. ¶ 17. For her part, Brennan states that she thought a five-day schedule might help Plaintiff complete her work more

efficiently, and be responsive to the staff's complaints about Plaintiff's lack of visibility in the unit. Brennan Aff. II ¶¶ 16-26.

Before any other corrective action could be implemented, seven nurses, representing almost half of the nursing staff working under Plaintiff's supervision in the PCU, requested a meeting with Brennan. DSUF ¶¶ 32-38. During a two-hour-long meeting held on July 10, 2015, these nurses vented about Plaintiff's failure to hold staff meetings and general lack of communication with the staff. They complained that when a staff meeting was finally scheduled for the first time in several years, Plaintiff took a vacation day and did not tell the staff that the meeting was cancelled; that Plaintiff had failed to provide them with any support during the challenging roll-out of a new electronic record system; that she yelled at the staff and tried to bully them into working extra hours; that she delegated many of her managerial duties to the department's expediter; that she dealt with scheduling and other personnel issues unfairly; and that she used work time to attend to personal tasks. On July 23, 2015, an eighth PCU nurse met with Brennan, echoing similar complaints, including that Plaintiff appeared to be in a rush, overwhelmed and not receptive to staff concerns. DSUF ¶¶ 41-45.

Plaintiff does not dispute that these meetings took place or that these supervisees made the referenced complaints. Instead, she attacks the complaints as hearsay[2] and disputes that they accurately reflect her performance, pointing out that she worked sixty hours a week; that she held informal staff "huddles" every day; that there were some formal staff meetings; that she was supportive during the roll-out of the electronic record system except at night; that the CNA who styled her daughter's hair for the prom did it on personal time; and that she only posted to social

[2] Plaintiff initially raised the hearsay challenge in a motion to strike. ECF No. 31. This motion was denied during the summary judgment hearing based on Davila v. Corporacion De Puerto Rico Para La Difusion Publica, 498 F.3d 9, 16 (1st Cir. 2007) and Vazquez-Valentin v. Santiago-Diaz, 459 F.3d 144, 151 (1st Cir. 2006).

media during work hours once. PSDF ¶ 38; PSUF ¶ 39. She also claims that at least some of her supervisees were motivated by ill will because she had imposed management changes on them to which they were resistant. PSUF ¶¶ 40-42.

After hearing the new wave of even more serious complaints, Brennan met again with her superior, Ducharme, as well as with a vice president from human resources. DSUF ¶¶ 46-47. They discussed the issues raised by the nurses, as well as the other performance issues that had surfaced earlier in the spring. They decided to discharge Plaintiff because, among other performance issues, she had clearly lost the confidence of her staff. DSUF ¶ 48. At no time during this meeting did they discuss either of Plaintiff's two whistleblowing complaints. DSUF ¶¶ 49-50. Brennan met with Plaintiff on July 27, 2015, and told her that she was being terminated based on performance issues raised by other Hospital employees. PSUF ¶¶ 37-38.

As these events were unfolding, Plaintiff made what she alleges are the two whistleblowing complaints that led to her termination. The facts that underlie these contentions follow.

b. First Whistleblowing Complaint –Hours Worked by and Recorded for Salaried Nurse Practitioners and Physician Assistants

At all times relevant to this case, the Hospital's nurse practitioners and physician assistants who worked in the Cath Lab were paid a salary and were assigned to specified shifts. DSUF ¶¶ 54-56 (citing Chagnon Dep. at 104). As exempt professionals, these employees had a long-standing practice, approved by the Hospital, that they could leave when their replacement was ready to take over and all patient care had been completed. Chagnon Dep. at 104-07. As a result of this practice, these employees regularly worked less than their full shifts. Chagnon Dep. at 107-08. Consistent with this Hospital-approved practice, a former Hospital manager had adopted the protocol of recording hours for these professionals based on specified shifts and had

instructed the secretary on the unit to use that protocol, rather than recording time based on the hours actually worked. Chagnon Dep. 104-08, 111, 118. At the time of these events, these nurse practitioners and physician assistants were directly supervised by Brennan. PSUF ¶ 11.

Sometime after Plaintiff became an interim manager in the Cath Lab, "around April" 2015, she became aware that the nurse practitioners and physician assistants were routinely leaving before the end of their shifts. Chagnon Dep. at 111. Plaintiff testified that she knew that this practice had no impact on the compensation paid these professionals; that it had been adopted by a former manager; and that the recording of inaccurate time was being done by a secretary based on instructions from the former manager. Chagnon Dep. at 104-07, 118. Inconsistently, Plaintiff also testified that she believed that this was a "crime" and a "fraudulent payroll practice" because "[t]hey were getting paid for hours that were not being worked on a consistent and regular basis." Chagnon Dep. at 107, 132.

It is undisputed that Plaintiff reported the practice to Brennan in late April 2015; they spoke several times about it. DSUF ¶ 64; PSUF ¶ 12. Plaintiff claims Brennan seemed overwhelmed and frustrated by these reports. PSUF ¶ 27; Chagnon Dep. at 175, 189, 197. On May 1, 2015, Brennan met with Leanne Burke, the clinical leader of this group of nurse practitioners and physician assistants, and discussed the situation with her. DSUF ¶¶ 65-69. Burke is one of the three staffers who would later complain about Plaintiff's job performance to Brennan on June 30, 2015. However, it is undisputed that Brennan did not inform Burke that it was Plaintiff who had brought the issue – hours worked by and recorded for physician assistants and nurse practitioners – to her attention.[3] DSUF ¶ 69.

[3] Nor is there any evidence suggesting that Burke otherwise became aware that it was Plaintiff who had initiated the change to the hours worked and recorded for physician assistants and nurse practitioners. See Chagnon Dep. at 141-42.

Brennan told Burke that the nurse practitioners and physician assistants must remain at the Hospital for their entire shifts and that their time must be recorded accurately. DSUF ¶¶ 67-68. Brennan confirmed with Plaintiff that she had spoken with Burke and that Burke would make sure that these staffers stayed for their full shifts. PSUF ¶ 13. In addition, by email dated the same day, May 1, 2015, Brennan advised Ducharme that she had met with Burke that day and explained the changes that would be put in place going forward, stating, "I am hopeful the discussion and summary will help improve this issue." Brennan Aff. I Ex. F. After she made this report to Brennan, Plaintiff testified that she encountered coolness on the part of unspecified staffers. Chagnon Dep. at 149. She also asserts that she believes that the nurse practitioners and physician assistants were unhappy about the change, but her testimony makes clear that she does not have any evidence permitting the inference that they knew it was she who had brought the issue to Brennan's attention.[4] PSUF ¶ 29; see Chagnon Dep. at 170-71.

According to Brennan, she understood that the steps she had taken would result in changes being implemented; based on an audit of the records from the Cath Lab, Brennan believes that they had been implemented by July 2015. DSUF ¶ 71; DSDF ¶ 20. Plaintiff disputes that Brennan's efforts were successful; she testified that she observed that the situation was not improving and raised the matter again with Brennan, and then brought it to Ducharme's attention in July. PSUF ¶¶ 14-18 (citing Chagnon Dep. at 130-33, 144-45). At the time of her termination on July 27, 2015, Plaintiff claims that the nurse practitioners and physician assistants were still working less than the full length of their shifts. PSUF ¶ 20.

c. Second Whistleblowing Complaint – Patient Recovery Location and Monitoring

[4] Plaintiff vaguely claims that the nurse practitioners and physician assistants were angry with her. PSUF ¶ 29. However, she supports this "fact" with nothing beyond her own deposition testimony that there was "tension," which she speculates was attributable to her "uncovering all this stuff." Chagnon Dep. at 170-71. When specifically asked during her deposition why she alleges that the termination was linked to her complaints to Brennan, she pointed only to the temporal proximity between the events. Id.

Hospital inpatients undergoing cardiac catheterization are sedated intravenously during the procedure; during recovery, the post-anesthesia care requirements set by federal and state regulations,[5] as well as by the Hospital's own standards, mandate that these patients be diligently monitored. See PSUF ¶ 24. During 2014, Hospital representatives had extensive discussions of this matter and decided to alter a long-standing practice of sending some of these patients to recover on the "floor" because it would be preferable for them to recover in the PCU, with the critical care unit ("CCU") as the backup location; an August 6, 2014, email concluded that "these patients would be better off in PCU." DSUF ¶¶ 92-94. Nevertheless, implementation of the change had been delayed because of restructuring in the CCU. DSUF ¶¶ 84, 91. Almost a year later, on June 9, 2015, concerned about the volume of these patients who were still recovering on the floor and about the level of monitoring they were receiving, Kelly Castle, a clinical manager on the floor, raised the issue again, sending an email to the Hospital's administrative director and others noting "a higher volume of post catheterization patients," and questioning her unit's ability to adequately monitor them. DSUF ¶¶ 75-78. She proposed a meeting to discuss the issue. Id.

Plaintiff was not copied on this initial email. Twenty minutes after Castle's email was sent, one of the recipients responded, agreeing that these patients should not recover on the floor but that the move to the PCU had been postponed because of the restructuring; this response was copied not only to the original group, but also to Plaintiff, Brennan and others. DSUF ¶ 80. Another recipient of the original email chimed in, agreeing that recovery on the floor was contrary to what had been decided in 2014. DSUF ¶ 82. An hour and a half after that, Plaintiff

[5] See 42 C.F.R. § 482(c)(2); 23-17 R.I. Code R. § 37.

jumped into the email string for the first time, writing to the others in the distribution list to explain her recollections:

> We had several discussions about the management of this group of patients and did agree that PCU would be a good place to manage the high risk or complicated groins/puncture sites. We did however determine that PCU volume would not always allow for these patients therefore we needed a secondary location and CCU was identified. At that time, it was decided to not move forward with this program because of the restructuring of Critical Care. To my knowledge, there has been no further discussion of the care of these patients.

DSUF ¶ 84.

Two more of the email recipients urged the group that the practice should be changed immediately. Then, about an hour later, Plaintiff sent a second email to the entire group, adding Ducharme to the string and recommending that both Brennan and Ducharme should be consulted before the current practice was changed. DSUF ¶¶ 85-86. Ducharme responded that she appreciated the discussion, thanked Plaintiff for adding her to the email string and directed that recovery should take place in the PCU or the CCU, not on the floor, pending further discussion. Brennan Aff. I Ex. J. Brennan cautioned the group about making a "huge change" without a careful analysis of logistics. Brennan Aff. I Ex. L. A week later, on June 18, 2015, Brennan, Ducharme, Plaintiff and others met and decided to schedule another meeting with an even larger group on June 25 in order to develop a protocol that would enable the PCU to accommodate these patients. DSUF ¶¶ 97-101. The next meeting took place on July 14 and the new protocol was initiated on August 6, 2015. DSUF ¶¶ 103-04.

Plaintiff does not dispute any of these facts, including the authenticity of her own June 9, 2015, email, sent after the matter had been raised by others, which indicated that there had been no discussion of the issue since 2014. Nonetheless, she testified that it was she who "discovered" this unsafe patient practice in May 2015, and immediately "reported" the situation

to Brennan.[6] PSUF ¶¶ 21-26. This fact is disputed – Brennan denies that Plaintiff spoke to her about the recovery location and monitoring of these patients at any time during the month of May 2015. Brennan Aff. II ¶ 7. Also disputed is Plaintiff's allegation that Brennan responded to her report with the dismissive statement: "Oh, something else." PSUF ¶ 28; DSDF ¶ 28.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is appropriate if the pleadings, the discovery, disclosure materials and any affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Taylor v. Am. Chemistry Council, 576 F.3d 16, 24 (1st Cir. 2009); Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). A fact is material only if it possesses the capacity to sway the outcome of the litigation; a dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010). The evidence must be in a form that permits the court to conclude that it will be admissible at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "[E]vidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Vasconcellos v. Pier 1 Imports (U.S.) Inc., C.A. No. 06-484T, 2008 WL 4601036, at *3 (D.R.I. Apr. 28, 2008). In ruling on a motion for summary judgment, the court must examine the record evidence in the light most favorable to the nonmoving party;

[6] Plaintiff argues that she also complained to Brennan about the qualifications of the staffers tasked with transporting these patients. PSUF ¶ 24. However, she presents no facts to support this claim. Rather, at her deposition, Plaintiff testified that she observed the non-clinical transporters and "put an end to it the day I found out about it." Chagnon Dep. at 188. According to her testimony, her complaint to Brennan was focused on the recovery location for these patients because that was a circumstance she could not fix on her own. Chagnon Dep. at 189. The argument about non-clinical transporters will not be discussed further.

the court must not weigh the evidence and reach factual conclusions contrary to the opposing party's competent evidence. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014).

In employment cases, summary judgment is appropriate when the party opposing the motion "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000); Bonilla v. Electrolizing, Inc., 607 F. Supp. 2d 307, 314 (D.R.I. 2009). The motion must be denied if there is sufficient evidence from which a reasonable jury could infer that the adverse employment action was based on discriminatory or retaliatory animus or that the employer's articulated reason is a sham and the true reason is discriminatory. Trainor v. HEI Hosp., LLC, 699 F.3d 19, 28 (1st Cir. 2012); Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996).

III. LAW AND ANALYSIS

a. Rhode Island Whistleblowers' Protection Act

Rhode Island's Whistleblowers' Protection Act, R.I. Gen. Laws § 28-50-1, *et seq.*, prohibits employers from discharging, threatening, or otherwise discriminating against an employee:

> Because the employee reports verbally or in writing to the employer or to the employee's supervisor a violation, which the employee knows or reasonably believes has occurred or is about to occur, of a law or regulation or rule promulgated under the laws of this state, a political subdivision of this state, or the United States, unless the employee knows or has reason to know that the report is false.

R.I. Gen. Laws § 28-50-3(4).[7] The Act imposes a heightened burden of proof on the employee if the alleged report of a violation of law was made verbally – in that event, the employee must establish by clear and convincing evidence that the report was made. Id.

[7] A prior version of the Act covered only reports made by employees to "a public body." R.I. Gen. Laws § 28-50-1 (1995); see Zinno v. Patenaude, 770 A.2d 849 (R.I. 2001); Picard v. R.I., 694 A.2d 754 (mem.) (R.I. 1997). The Act

The purposes of the Act are to foster compliance with the law and "to encourage the prompt reporting and early, amicable resolution of potentially dangerous workplace situations, and to protect those employees who do report such violations from retaliatory action by employers." Malone v. Lockheed Martin Corp., C.A. No. 07-65-ML, 2009 WL 2151706, *12 (D.R.I. July 16, 2009) (quoting Marques v. Fitzgerald, 99 F.3d 1, 6 (1st Cir. 1996)). As this Court noted when permitting a whistleblower claim to proceed before the Act was passed, "giving a whistleblowing employee a cause of action in tort for retaliatory discharge is the wave of the future." Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 138 (D.R.I. 1988).

For a *prima facie* case of whistleblowing retaliation, the plaintiff must demonstrate: 1) that she engaged in protected whistleblowing conduct as defined by the Act; 2) that she suffered an adverse employment action contemporaneously or thereafter; and 3) that the adverse action was causally related to the protected conduct. Barboza v. Town of Tiverton, C.A. No. 07-339-ML, 2010 WL 2231995, *7 (D.R.I. June 2, 2010); Marques, 99 F.3d at 4. To establish the first element, a plaintiff must demonstrate that he or she reported a violation of law, either past or imminent; however, the plaintiff "need not establish that the conduct [] he opposed was in fact" unlawful. Johnston v. Urban League of R.I., Inc., C.A. No. 09-167S, 2011 WL 2297655, *6 (D.R.I. May 17, 2011). Rather, the plaintiff may rest on her reasonable belief. R.I. Gen. Laws § 28-50-3(4). However, the "plaintiff must not only believe in good faith that his employer engaged in an unlawful [] practice, but also his belief must be objectively reasonable in light of the facts and record presented." Id. "The court evaluates the objective reasonableness of an employee's belief based on the knowledge available to a reasonable person in the same factual circumstances and with the same training and experience as the employee." Barker v. UBS AG,

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was amended in 2002 to provide protection for employees making reports to their supervisor or employer. Malone v. Lockheed Martin Corp., C.A. No. 07-65-ML, 2009 WL 2151706, *11 (D.R.I. July 16, 2009).

888 F. Supp. 2d 291, 297 (D. Conn. 2012) (interpreting federal whistleblower statute to require both "a subjective belief and an objectively reasonable belief that conduct … constituted a violation of relevant law").

To qualify as protected whistleblower conduct, the claimant's report must consist of something more than passing a report "up the supervisory chain." Malone, 2009 WL 2151706, *3, 12 (no whistleblowing where plaintiff simply passed along report from coworker regarding alleged wrongdoing by others). Further, the whistleblower must know, or believe, that the employer engaged in conduct beyond what the employee finds worthy of criticism or requiring correction – the subject of the whistleblowing must amount to a violation of an identified federal, state or local law or regulation. Slay v. Bank of Am. Corp., C.A. No. 10-408ML, 2011 WL 1045629, at *12 (D.R.I. March 9, 2011) (adopted 2011 WL 938309 (D.R.I. March 16, 2011)) (dismissing whistleblower claim based on accusation that employer permitted security breach because no plausible explanation for how any law or regulation was violated).

For the second and third elements of the *prima facie* case, the Rhode Island Supreme Court has held that an adverse employment action that is "materially adverse" and "inflicts direct economic harm" must be causally linked to the protected conduct. Russo v. R.I. Dep't of Mental Health, 87 A.3d 399, 408 (R.I. 2014); see Rossi v. Amica Mutual Ins. Co., 446 F. Supp. 2d 62, 67 (D.R.I. 2005). The third element – causation – requires that there is a "substantial nexus" between the protected report of a violation by the employee and the adverse employment action, which must be based on more "than pure speculation." Belanger v. A & F Plating Co., No. Civ. A. 98-2339, 2002 WL 1288782, at 4 (R.I. Super. June 7, 2002); Malone v. Lockheed Martin Corp., 610 F.3d 16, 23 (1st Cir. 2010); Senra v. Town of Smithfield, 715 F.3d 34, 42 (1st Cir. 2013). Without a causal link between the whistleblowing complaint and the adverse

employment action, the claim fails as a matter of law. Malone, 610 F.3d at 23. However, for the *prima facie* case, the causation bar is set low; it may be cleared with nothing more than temporal proximity between the whistleblowing and the adverse employment action. DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) (depending on length of delay, showing of discharge soon after protected conduct can be indirect evidence of causal link).

As with other employment discrimination claims, once a claimant has established a *prima facie* case, the case is then analyzed under the familiar three-step, burden-shifting framework outlined in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). Barboza, 2010 WL 2231995, *9. The *prima facie* case creates a presumption that the employer retaliated for the whistleblowing and shifts the burden to the employer to articulate a non-discriminatory reason for the adverse action. If the employer can clear this step, at the third and final step, the burden shifts back to the plaintiff to demonstrate that employer's reason is a mere pretext and that the true reason for the adverse action is unlawful retaliation for whistleblowing. See Vasconcellos, 2008 WL 4601036, at *4. At summary judgment, however, a causation proffer at the third, rebuttal stage that relies on nothing more than temporal proximity is insufficient as a matter of law to establish pretext. Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 25 (1st Cir. 2014) (temporal proximity must be reinforced by other evidence at summary judgment phase); Reilly v. Cox Enters., Inc., No. CV 13-785 S, 2016 WL 843268, at *3 (D.R.I. Mar. 1, 2016).

b. Analysis of Plaintiff's Claims

Plaintiff stumbles at the first hurdle posed by the *prima facie* case – that is, her evidence is insufficient as a matter of law to permit a fact finder to conclude that she engaged in protected whistleblowing conduct as defined by the Act. Further, were she able to make out a *prima facie* case, she lacks the evidence of pretext needed to successfully rebut the Hospital's explanation for

her termination; that is, Brennan's receipt of complaints were sufficient to persuade the Hospital that Plaintiff had lost the confidence of her staff.

1. Hours of Nurse Practitioners and Physician Assistants

First, let's examine Plaintiff's report to Brennan about the nurse practitioners and physician assistants going home before they had completed their shifts, and the inaccurate recording of their hours by the unit secretary. While Plaintiff may believe that the employees were committing fraud, this belief is not objectively reasonable. Consequently, because it is not a report of a violation of "a law or regulation or rule," this report is not protected conduct under the Act. R.I. Gen Laws § 28-50-3(4). Moreover, Plaintiff's report was well received by Brennan who promptly instructed Burke to end the practice, and advised her own superior of the situation. Finally, the dispute over whether Brennan's actions were effective is immaterial.

In her deposition, Plaintiff conceded that she knew that the practice had no impact on the salaries paid to these workers, that it had been adopted by the Hospital itself (acting through a prior manager) and that the inaccurate records were maintained in accordance with the Hospital's directive (acting through the same prior manager). In light of this testimony, Plaintiff's insistence that she nevertheless believed that the practice was a crime, amounting to a fraudulent pay practice, PSUF ¶ 10, does not meet the standard of a subjective good faith belief that the employer violated the law which is also "objectively reasonable in light of the facts and record." Johnston, 2011 WL 2297655, *6. Whatever Plaintiff claims she believes, the statutes Plaintiff cites to support her claim – R.I. Gen. Laws § 11-41-1 ("Stealing as Larceny") and R.I. Gen. Laws § 11-41-4 ("Obtaining Property by False Pretenses") – do not limn the kinds of charges that would be leveled at salaried professionals who leave before the end of a set shift, pursuant to a time-honored practice approved by their employer. See Slay, 2011 WL 1045629, *12. Put

differently, the conclusion that this was criminal larceny is not objectively reasonable, mindful of the knowledge available to a reasonable person in the same factual circumstances and with the same training and experience as Plaintiff. See Barker, 888 F. Supp. 2d at 297. Accordingly, I find that this conduct is not protected whistleblowing because Plaintiff neither knew nor held an objective good faith belief that the practice she exposed to Brennan was a violation of "a law or regulation or rule."

If Plaintiff's evidence were sufficient to create a presumption of whistleblowing, the burden would shift to the Hospital to establish a non-discriminatory, or non-retaliatory, reason for Plaintiff's termination. Here, the Hospital has succeeded in proffering evidence sufficient to demonstrate that Brennan fired Plaintiff as a result of numerous complaints about her job performance, leading the Hospital to conclude that she had lost the confidence of her staff. When the burden shifts back to Plaintiff, in accordance with the McDonnell Douglas analysis, Plaintiff is unable to present sufficient rebuttal evidence to demonstrate that the Hospital's rationale is a pretext for discrimination. The only concrete fact in the record that might serve causally to connect the alleged whistleblowing with the termination is that Burke, who was one of the many staffers who complained to Brennan about Plaintiff, was also one of the workers adversely affected by the "whistleblowing" in that she was the leader for the group of affected nurse practitioners and physician assistants. There are three reasons why this evidence does not permit an inference of a causal link between the termination and the alleged whistleblowing.

First, Burke complained to Brennan about Plaintiff on June 30, 2015. Based on the seven complaints about Plaintiff that she had received as of that date, Brennan still believed that Plaintiff's performance could be improved and was working on a corrective plan of action; that

is, Burke's complaint did not trigger the decision to terminate.[8] It was only after the meetings with eight of Plaintiff's supervisees (none of whom was affected by Plaintiff's alleged whistleblowing) that Brennan, Ducharme and the human resources vice president made the decision to terminate Plaintiff. Second, it is undisputed that Brennan did not reveal to Burke who had told her about the hours worked by the nurse practitioners and physician assistants. Accordingly, there is not a scintilla of evidence that Burke's complaint about Plaintiff was related to or triggered by Plaintiff's report about the nurse practitioners and physician assistants. Third, Burke was one of fifteen different staffers and managers who made similar criticisms about Plaintiff's job performance; apart from the two who accompanied Burke when she met with Brennan, none is linked to Burke. Thus, if Brennan had ignored the Burke complaint (and those from the two who joined her), she would still have had ample untainted reasons for the decision to terminate.

Also pertinent is the undisputed evidence showing that Brennan was glad to be appraised of the situation, took immediate steps to address the issue and informed her supervisor of her actions. Such a quantum of evidence renders illogical the inference that Brennan fired Plaintiff because of her report. See Tavares v. Enter. Rent-A-Car Co. of R.I., C.A. No. 13-521S, 2016 WL 7468130, at *16 n.20 (D.R.I. June 16, 2016), adopted, 2016 WL 6988812 (D.R.I. Nov. 29, 2016) (it "belies common sense" that supervisor who accepted plaintiff's complaint and publicly acted on it would terminate plaintiff for making it); Barboza, 2010 WL 2231995, at *9 (illogical

[8] Burke's complaint also did not trigger Brennan's decision to require Plaintiff to switch to working five days per week; the undisputed evidence establishes that the schedule change was announced before Burke brought her complaint to Brennan. Therefore, the Court need not decide whether Plaintiff's testimony that the schedule change made her unhappy because it disrupted child care arrangements is sufficient evidence of the "undue hardship" that must be shown to convert a work schedule alteration with no impact on compensation or title into an adverse employment action. Morales-Vallellanes v. Potter, 605 F.3d 27, 39 (1st Cir. 2010); see Lushute v. La. Dep't of Soc. Servs., 479 F. App'x 553, 555 (5th Cir. 2012) (schedule change with no alteration of total hours is not adverse employment action); Byerly v. Lew, No. CIV-15-630-C, 2016 WL 7028944, at *2 (W.D. Okla. Dec. 1, 2016) (change from four-day to five-day week may be inconvenient but is not adverse employment action).

that sexual harassment complaint was real cause of decision to terminate when termination decision-maker also initiated sexual harassment investigation). While Plaintiff disputes that Brennan was effective in ending the leaving-early practice, she does not dispute that Brennan took action on the issue and disclosed the problem and her proposed solution to Ducharme.

In an effort to rebut the Hospital's evidence, Plaintiff focuses on what she perceived as Brennan's negative reaction to her report. Plaintiff testified that Brennan became "overwhelmed" and "frustrated" when Plaintiff more than once brought up the issue of the hours worked by the nurse practitioners and physician assistants. PSUF ¶ 27. Plaintiff also asks the Court to focus on the cumulative effect of her reports, reflected in her testimony that Brennan responded, "Oh, something else," when she made the report about the patient recovery location. PSUF ¶ 28. This testimony fails to establish pretext. First, the testimony about being "overwhelmed" and "frustrated" amounts to nothing more than the subjective description of a supervisor's non-verbal reaction to protected conduct, which is insufficient as a matter of law to establish pretext. O'Rourke v. Boyne Resorts, No. 12-cv-445-SM, 2014 WL 496859, at *9 (D.N.H. Feb. 7, 2014) (supervisor's "surprise" on learning of plaintiff's pregnancy insufficient to demonstrate pretext); see Vasconcellos, 2008 WL 4601036, *5 (applying RICRA, evidence that supervisor "seemed put off" after learning of pregnancy insufficient to avoid summary judgment). Moreover, it is well settled that such "isolated, ambiguous remarks are insufficient, by themselves, to prove discriminatory intent." Lehman v. Prudential Ins. Co. of Am., 74 F.3d 323, 329 (1st Cir. 1996).

Plaintiff's final argument that the Hospital's stated reason for her termination was a pretext to cover up its retaliatory motive founders on the lack of a factual foundation. Based on her own testimony, Plaintiff claims that the changes in the work patterns for the nurse

practitioners and physician assistants resulted in tension and unhappiness. She argues that the change in the workplace atmosphere permits the inference that Brennan acted as the "cat's paw" for these angry workers when she accepted their complaints as true and terminated Plaintiff. See Morrissette v. Honeywell Bldg. Sols. SES Corp., C.A. No. 10-12-ML, 2011 WL 3652428, at *7 (D.R.I. Aug 17, 2011) (employer may be liable if biased subordinate uses decision-maker as dupe to trigger unlawful employment action). These arguments fail because there is no evidence that any of the "angry" workers knew or believed that Plaintiff was the cause of the changes to their schedules. Further, other than Burke, there is no evidence suggesting that any of the many complaints Brennan received about Plaintiff's job performance had any conceivable relationship to the alleged anger of the nurse practioners and physicians' assistants.

In short, apart from temporal proximity of Plaintiff's report in April with the proposal to change her work schedule in June and her termination in late July, there is no cognizable evidence to permit a fact finder to conclude that Plaintiff was let go because she had alerted Brennan to the inconsistencies in hours worked. And temporal proximity, standing alone, is not enough to rebut an employer's evidence of a non-discriminatory reason for termination. Reilly, 2016 WL 843268, at *3. With neither a report of a violation pursuant to the Act, nor any causal link between the alleged whistleblowing and the adverse employment action, Plaintiff's claim that she was fired in retaliation for exposing the early departures and the mis-recording of hours for the nurse practitioners and physician assistants fails as a matter of law.

2. Catheterization Patients – Recovery Location

Plaintiff's second whistleblowing scenario similarly fails to trigger the protection of the Act. This alleged whistleblowing arises from Plaintiff's claim that, sometime in May 2015, she made an oral report to Brennan about concerns over where the cardiac catheterization patients

should recover, so that they could safely be monitored. PSUF ¶¶ 21-26. Under R.I. Gen. Laws § 28-50-3(4), the Act imposes on the employee claiming to have made such a verbal whistleblowing complaint the burden to prove that it was made by clear and convincing evidence. Plaintiff's evidence does not come close. Instead, the undisputed evidence establishes that the topic of the location of patient recovery had been the subject of wide and open discussion in 2014 so that Plaintiff's claim that she "discovered" it is illogical. It is also undisputed that it was brought up again in June 2015, not by Plaintiff, but by another Hospital employee. Plaintiff chimed in with an email that acknowledges the 2014 discussions and directly contradicts her claim that she raised the issue in May: "To my knowledge, there has been no further discussion of the care of these patients." DSUF ¶ 84.

Against this powerful evidence, the authenticity of which Plaintiff does not dispute, there is only Plaintiff's vague statement that "maybe in early May," Chagnon Dep. at 173, she made a verbal report to Brennan. See Malone, 2009 WL 2151706, at *13 (where plaintiff did not discover inappropriate conduct of subordinates, report is "not the type of conduct the whistleblower statute seeks to protect"). Accepting Plaintiff's testimony about her report as true, it indicates only that Plaintiff was passing along a report about a problem identified by others "up the supervisory chain," perhaps bringing a manager who was new to the unit up to speed on a topic already under general discussion. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 230 (Sup. Ct. Minn. 2010) (no actionable whistleblowing claim where plaintiff's advice was offered as part of normal job duties); Malone, 2009 WL 2151706, at *12 (reporting of incident by various employees, including plaintiff, is not conduct that Act protects from retaliation). As a matter of law, Plaintiff's evidence falls woefully short of what is sufficient to permit a fact finder

to conclude by clear and convincing evidence that whatever she said to Brennan about patient care in May 2015 was conduct protected by the Act.

The other major flaw in Plaintiff's reliance on an alleged conversation with Brennan in May 2015 is the complete dearth of anything but speculation to link that conversation with Brennan's decision to terminate Plaintiff. The undisputed evidence demonstrates that Brennan, Ducharme and every other Hospital administrator and staffer who participated in the discussion all shared Plaintiff's concern about patient care and were uniformly committed to solving the problem. Other than the temporal proximity of the alleged report to Brennan (early May) and the termination (late July), there is no competent evidence that Plaintiff's role in this general discussion was unwelcome to Brennan or any other staff or administrators. Because it is well settled that temporal proximity is not enough at this phase of the case, Reilly, 2016 WL 843268, at *3, Plaintiff is left with insufficient evidence from which a fact finder could infer that Brennan's stated reasons for discharging her were a pretext to cover up retaliation based on whatever she said in May 2015 about patient care.

3. Admissibility of Hospital's Evidence of Non-Discriminatory Reason for Termination

To pull her case out of this summary judgment bramble, Plaintiff argues vociferously that the Court should ignore the Hospital's proffer of the many complaints made to Brennan, which demonstrate that Plaintiff was discharged for a non-discriminatory reason. In support of this argument, she contends that the complaints are inaccurate and inadmissible hearsay and may not be considered in connection with summary judgment. PHL Variable Ins. Co. v. P. Bowie 2008 Irrevocable Trust ex rel. Baldi, 889 F. Supp. 2d 275, 279 (D.R.I. 2012), aff'd, 718 F.3d 1 (1st Cir. 2013). The argument is unavailing.

First, as the Court held in denying Plaintiff's motion to strike,[9] the law is pellucid that such complaints, going to the state of mind of the decision-maker, are not inadmissible hearsay and are entirely appropriate for consideration at summary judgment. Vazquez-Valentin v. Santiago-Diaz, 459 F.3d 144, 151 (1st Cir. 2006) (evidence of statements that motivated employer to demote plaintiff not hearsay because not offered for truth of matter asserted; exclusion of such "highly relevant" documents would justify new trial). Further, it is also well settled that, to establish that Plaintiff was discharged for a non-pretextual reason, the Hospital "need do no more than articulate a reason which, on its face, would justify a conclusion that the plaintiff was let go for a nondiscriminatory reason." Davila v. Corporacion de Puerto Rico Para La Difusion Publica, 498 F.3d 9, 16 (1st Cir. 2007). In making this offer of proof, the Hospital may present, and the Court may consider, the many complaints – true or not – that establish Brennan's motivation in discharging Plaintiff. Id. at 16-17; see Tavares, 2016 WL 7468130, at *16 (whether hearsay statements establishing discipline-worthy conduct by plaintiff were true or not, undisputed evidence that such statements were brought to employer's attention and resulted in termination more than sufficient to result in summary judgment in favor of employer). In the absence of evidence that Brennan disbelieved the complaints she received about Plaintiff – and this is not indicated in the record – Plaintiff's challenge to the accuracy of the complaints amounts to nothing more than an argument that the decision to terminate Plaintiff was "unfair or unwise."[10] Bonefont-Igaravidez v. Int'l Shipping Corp., 659 F.3d 120, 126 (1st Cir. 2011); see

[9] See n.2, *supra*.

[10] Plaintiff's argument does not even go so far. She actually contends only that her supervisees bore her ill will, not because of whistleblowing, but because she had imposed management on nurses who had been managing themselves. PSUF ¶ 42. While the Hospital properly invokes the principle that the law does not make actionable an employer's unwise decision to terminate an employee, one might observe that it is not necessarily unwise for an employer to conclude that a supervisor who is unable to restore order without triggering ill will is not performing the job adequately. That, however, is beside the point. What matters in this case is that, even if the complaints were

Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1118 (1st Cir. 1993) (focus must be on perception of decision maker). It is not the task of the Court "to second-guess" an employer's decision to fire an employee determined to be a poor performer. Davila, 498 F.3d at 17. I decline to acquiesce to Plaintiff's urging that the Court resolve this summary judgment motion as if those complaints did not exist.

4. Summary of Findings

Based on the foregoing, I conclude that, as a matter of law, Plaintiff cannot establish a *prima facie* case of whistleblowing under the Act because she cannot demonstrate that her reports to Brennan were protected conduct. I also find that the Hospital has sustained its burden of articulating a non-discriminatory reason for terminating Plaintiff based on its proffer of evidence of an array of complaints about Plaintiff's job performance, all of which is admissible and appropriate for consideration at summary judgment. I further find that, even if Plaintiff were to surmount the hurdle of establishing a *prima facie* case, her claim founders on the lack of any evidence permitting the inference that Defendant's proffered reasons for discharging her were pretextual, or that she was truly fired in retaliation for the conduct she claims is protected by the Act.

IV. CONCLUSION

Based on the foregoing, I recommend that Defendant's motion for summary judgment (ECF No. 24) be GRANTED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district

colored by ill will (and Plaintiff has no proof to suggest that they were), as long as the ill will was untethered to discrimination or protected conduct, it was not illegal for Brennan to rely on them.

judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 19, 2017